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June 4, 1996

Honorable Alicemarie H. Stotler
United States District Court
for the Central District of California
751 West Santa Ana Blvd.
Santa Ana, CA 92701

Re: 28 USC § 1292(e)

Dear Judge Stotler:

Bill Eldridge told me of your conversation regarding the rulemaking authority under § 1292(e) to specify appellate jurisdiction, and asked me to inform you of our plans for research in this area.

As an initial effort, we are attempting to learn more about jurisdictional defects that arise on appeal. Clerks and staff attorneys tell us that the problems are of two types: Pro se petitioners typically err in the timing of the appeal; attorneys typically misunderstand the collateral order doctrine. I was surprised to learn that in each of its past ten terms the Supreme Court has considered at least one case interpreting appealability of interlocutory orders. This term certiorari was granted in two cases interpreting the collateral order doctrine. The two opinions in Court's recent decision in *Behrens v. Pelletier* suggest differences of opinion concerning the purpose of the collateral order doctrine.

We hope to use staff attorney records from the Ninth Circuit Court of Appeals to determine the nature of jurisdictional errors. Last year in the Ninth Circuit jurisdictional defects resulted in the early termination of 444 appeals. We plan to identify the types of problems that arise and offer suggestions for overcoming such problems. If time permits, we will also pull a sample of cases to determine how often the various sources of appellate jurisdiction are asserted. This will permit us to assess the jurisdictional defects in light of the frequency with which types of appellate jurisdiction are invoked. We hope to have a preliminary draft by fall of 1996.

Two other studies are being discussed but are not underway. We are considering a study of the exercise of discretion by the district courts in certifying issues for interlocutory appeal under 28 USC § 1292(b). We hope that by identifying those issues that are presented for certification we will learn of

promising opportunities for expansion of appellate jurisdiction for interlocutory appeals.

Finally, we may try to estimate the effect in the federal courts that would flow from the proposal of the ABA Commission on Standards of Judicial Administration for more discretion in designating issues for appellate review. This proposal would eliminate all judicially-created exceptions to the final judgment rule and leave only statutory and rule-based exceptions. Only judgments that are formally final would be appealable as of right; interlocutory judgments would be appealable only with permission of the reviewing court. Such a system has been adopted by the state of Wisconsin and surprisingly few petitions for interlocutory review have been submitted. We hope to examine the experience of the Wisconsin courts to predict how such jurisdiction might operate at the federal level.

Such information may aid the Standing Committee in proposing new categories of interlocutory appeals under § 1292(e). I understand that the Advisory Committee on Appellate Rules has had such an item on its long-range agenda for some time but no immediate action is planned.

Bill also mentioned that you are interested in law review articles that discuss the rulemaking authority under 28 USC § 1292(e) to create exceptions to the final judgment rule. I found the following to be helpful:

Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence With Discretionary Review*, 44 Duke L.J. 200 (1994);

Martineau, *Defining Finality and Appealability by Court Rule: "Right Problem, Wrong Solution,"* 54 U. Pitt. L. Rev. 717 (1993); and

Rowe, *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution,"* 54 U. Pitt. L. Rev. 795 (1993).

Rowe's article directly addresses the role of rulemaking under § 1292(e). An earlier influential article that argues for broader appellate jurisdiction is:

Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165 (1990).

As you see, we are still exploring how we should proceed. Any thoughts you may have concerning how our work can aid the Standing Committee and the advisory committees will be greatly appreciated.

Sincerely,

Joe S. Cecil
Senior Research Associate

cc: Hon. Rya Zobel
William Eldridge

